SERVED: January 24, 2005

NTSB Order No. EA-5133

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 2005

APPLICATION OF FRANK BOSELA For an award of attorney fees and expenses under the Equal Access to Justice Act	)	Docket 298-EAJA-SE-15725

OPINION AND ORDER

Applicant has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William A. Pope, II, issued on May 6, 2003.[1] The law judge denied the application for fees and expenses *in toto*. We affirm the law judge and deny the appeal.

The Administrator's Amended Emergency Order of Revocation alleged that on April 14, 1999, applicant (then called respondent), a captain for Airborne Express, provided a urine specimen pursuant to Airborne's DOT-mandated random drug testing

[1] The initial decision is attached.

program. According to the Administrator, the specimen contained an unnaturally high level of nitrite (6,909 µg/mL), indicating that it had been adulterated.[2]

Both the Administrator and applicant offered the testimony of highly qualified experts with regard to the testing procedures. The law judge found, and the Board agreed, that applicant's challenges to the collection and chain of custody procedures were unconvincing. However, the law judge was not satisfied with the procedure used for testing for adulteration. Two tests had been used. The law judge determined that one of them, the dipstick nitrite test, had not been shown to be "scientifically suitable" because the dipstick had not been used exactly in accordance with its published instructions.[3] Nevertheless, because the other test, the Olympus AU800 nitrite test (which indicated a nitrite level of 6,909 µg/mL) was found to be scientifically suitable, the law judge upheld the section 61.14(b) violation and affirmed revocation.

On appeal, however, the Board reversed the complaint and

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[2] Applicant was charged with violating 14 C.F.R. 61.14(b) (refusal to submit to a drug test) because he engaged in conduct that clearly obstructed the testing process by providing an adulterated sample. The applicable standard provided that to be adulterated with nitrites required a level of nitrites equal to or greater than 500 µg/ml. Department of Health and Human Services (DHHS) Program Document Number 35 (PD-35), dated September 28, 1998.

[3] PD-35 required that testing for adulterants follow "scientifically suitable methods." The Administrator had no more specific regulations on testing for adulterants.

order, finding that two scientifically suitable tests for adulteration were required to ensure accurate results. The Board determined that the dipstick test was not scientifically sui table and, therefore, the Administrator's charge that applicant's urine sample was adulterated with nitrites was not adequately proven. The EAJA petition followed.

There is no question that applicant is a prevailing party and his net worth does not preclude an award. EAJA requires more, however. No award is authorized if the government shows that at all times its case was substantially justified. The relevant inquiry is whether the government's case is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541 (1988) at 565; Federal Election Com'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) (it is not whether the government wins or loses or whether the government appeals that determines whether its position is substantially justified). Accord Catskill Airways, Inc., 4 NTSB 799 (1983) (test is "reasonable basis both in fact and law"). EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases; the statute is intended to caution agencies carefully to evaluate their cases, not to prevent them from bringing those that have some risk. Id.

In his ruling on the EAJA petition, the law judge found that the Administrator was substantially justified in bringing this case. We agree with the law judge, and find his decision

carefully and thoroughly reasoned. We adopt it as our own on this point. We know that, during its investigation and in preparation for trial, the FAA consulted with at least the following experts on this issue of the adequacy of the nitrite test: Dr. Frank Esposito, Dr. David Kuntz, and Dr. Yale Caplan. All three had extensive experience in the field; we will not repeat their credentials. All were satisfied that the Administrator's evidence showed nitrite adulteration. All were obviously comfortable assisting the Administrator in her investigation and testifying on behalf of the Administrator in this matter. Their views could be relied on by the FAA both as to the facts and as to the applicable testing standards.

There is no basis to conclude that the FAA proceeded in the face of facts or law that did not support its claims. Applicant argues that the FAA should have done further investigation and, had it done so, would have determined that the dipstick test was not reliable. We disagree, and there is nothing in the record to so indicate other than this Board's first impression conclusions that the dipstick test as conducted was not "scientifically suitable" and that two scientifically suitable tests were required. Further, applicant's characterization of the applicable standard far exceeds what was reasonable for the FAA to assume.

The most that can be said in applicant's favor is that the experts recognized that two tests would be better than one. Nevertheless, and no one here argues to the contrary, the

regulations at the time did not require two different tests for nitrites. The Board's decision on this matter did not explicitly hold that two tests were required under PD-35, but only that, in the Board's view, "scientifically suitable" methods -- a term not defined in the DHHS regulation -- required two tests. Furthermore, the Olympus quantitative test produced readings so much larger than the adulteration criterion that the second and only qualitative dipstick test could reasonably be viewed as a satisfactory check.

Contrary to applicant's claim, there was no "blind faith" in the lab's work. Not only did the FAA carefully explore the practices of the lab, but two of its three experts were not affiliated with that lab yet confirmed its findings. There is no suggestion in the record that at any time the Administrator's experts advised the FAA that its interpretation violated the DHHS standard applicable at the time.[4]

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[4] The law judge found an EAJA award unavailable for another reason, that applicant did not "incur" the fees and expenses as EAJA requires because the Teamsters Local 1224, Airline Professional Association, paid all of applicant's litigation costs. Applicant concedes that this was the case but argues that the union is entitled to be repaid through recovery by applicant here.

The law judge relied on Administrator v. Livingston, NTSB Order No. EA-4797 (1999), wherein we examined in what circumstances it would be reasonable and consistent with EAJA to award fees and expenses despite an applicant not being directly liable for ("incurring," in the statute's words) those costs. We denied EAJA recovery in that case because fees and expenses were paid in full by applicant's former employer. Livingston, in turn, had relied on an earlier decision, Administrator v. Scott, NTSB Order No. EA-4472 (1996). In that case, we focused on use of contingency arrangements whereby if applicant prevailed any

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Although the law judge did not reach this issue, we are compelled also to note that applicant's EAJA application fails in a number of important respects to conform to our rules and was therefore subject to rejection. For example, applicant claims an hourly rate of $225 for attorney fees. Applicant is charged with knowing and abiding by the regulations, yet this hourly rate far exceeds the maximum allowed by statute. See 49 C.F.R. 826.6(b)(1). The maximum hourly rate is now $152. Similarly, we have no basis to conclude that expert witness fees do not exceed the statutory maximum. See 49 C.F.R. 826.6(b)(2).

It is not the Board's obligation to recalculate awards and seek extensive additional evidence so that an application may comply with statutory and regulatory requirements. Fees for experts and all travel expenses must be fully justified. Title 49 C.F.R. § 826.23 requires separate itemized statements for each

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EAJA recovery would be paid over to the attorney, but that if he did not prevail he would owe nothing. We held that use of such arrangements would not preclude recovery. There is no evidence of such an agreement here.

Instead, applicant argues that Wilson v. General Services Administration, 126 F.3d 1406 (Fed Cir 1997), as well as other cases, require that we treat applicant as if he incurred the fees and expenses. The FAA in response argues that it believes Wilson was wrongly decided, and we see inconsistencies between Wilson and SEC v. Comserv, 908 F.2d 1407 (8th Cir. 1990), a case we discussed in Wilson and Scott. We need not reach the issue here given our conclusions regarding substantial justification. And in light of the FAA's failure to address the issue in a meaningful way, and the fact that many of the cases cited by applicant were decided after Scott and were not reviewed in Livingston, we decline to do so. We prefer to wait for a case where the issues have been more thoroughly examined.

expert. Applicant made no effort to comply. In addition, applicant is required to provide a detailed itemization of work with corresponding hours and fees for legal services. Most of his application fails to do so. For example, there is no indication on most of the bills who performed which work and whether, if more than one attorney worked on the case, each is entitled to the same rate. See 49 C.F.R. § 826.6(c)(1-5). There are significant, wholly unexplained charges for outside counsel. There are considerable expenses clearly unrelated to this case. See June 30, 2000 billings for the "Sipps" case. Overall, applicant's application is deficient, inadequate, and unreliable as a measure of applicant's fees and expenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The law judge's decision to the extent consistent with this opinion is affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.